A

SIVANANTHAN KRISHNAN v. JADE HOMES SDN BHD

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
MARY LIM JCA
HASNAH MOHAMMED HASHIM JCA
B [CIVIL APPEAL NO: B-02(C)(W)-2184-10-2017]
27 FEBRUARY 2019

C ***LAND LAW:*** *Housing developers – Building contract – Material defects in construction of property – Non-compliance with condition stipulated in development order – Failure to build reinforced concrete wall – Whether rubble wall sufficient to protect stability of adjoining property – Whether approval of building plan subject to compliance with conditions – Whether conditions must be strictly complied with – Whether developer ought to deliver property according to approved plan*

D By a sale and purchase agreement ('SPA'), the plaintiff purchased a property from the developer ('the defendant'). However, after taking possession of the property, the plaintiff could not physically occupy the property due to material defects in the construction of the property. The plaintiff contended that the defendant failed and/or neglected to build a 'reinforced concrete wall' ('RC wall') as required under condition 8 of Annexure F ('condition E 8') of the approved building plan/development order ('DO') by Majlis Perbandaran Kajang ('MPKj'). It was contended by the plaintiff that instead of constructing the RC wall, the defendant had constructed a three rubble wall to protect the stability of the adjoining property. It was the plaintiff's pleaded case that the defendant had failed and/or neglected to comply with F the DO and their own undertaking to construct the RC wall on the slope of the property. The defendant's failure to construct the RC wall had caused damage and hardship to the plaintiff and his family and they were deprived of the full use and enjoyment of the property, especially the wet kitchen area. On the other hand, the defendant contended, *inter alia*, that (i) it had G complied with all the applicable conditions attached to the approved building plan; (ii) the requirement of an RC wall under condition 8 only applied to an immediate vertical drop exceeding 1200mm; (iii) there was no immediate vertical drop between the slope at the property and the neighbouring lot that required construction of an RC wall; and (iv) the use of the rubble wall was H in accordance with the approved building plans. The High Court, in considering whether there was a breach of condition 8 by the defendant for failing to construct the RC wall, made a decision in favour of the defendant. Hence, the appeal by the plaintiff. The plaintiff contended, *inter alia*, that there must be strict compliance by the defendant of condition 8 and there could be no waiver as the SPA was as prescribed under the Housing I Development (Control and Licensing) Act 1966 and the Housing Development (Control and Licensing) Regulations 1989. The plaintiff further contended that the trial judge had not given due weight to the letter

of undertaking to MPKj in which the defendant undertook to be fully responsible in respect of the design and construction of the slope and RC wall and to comply with all the conditions laid down by MPKj.

Held (allowing appeal with costs)
Per Hasnah Mohammed Hashim JCA delivering the judgment of the court:

(1) Condition 8 could not be considered in isolation of the documents relevant to the approved building plans and related correspondences. Condition 8 required an RC wall to be constructed where there was a platform level difference exceeding 1200mm. The platform level difference at the affected area was 3.5 meters. It was neither stated nor specified under condition 8 that it only applied to an adjacent platforms as suggested by the defendant's expert and the defendant's architect. Even assuming that condition 8 was vague and applied to adjacent platform, the defendant did not seek any clarification from MPKj but instead chose to interpret condition 8 in accordance with their own considerations, which was costs driven, and ignored completely the conditions imposed by MPKj. (paras 22, 23 & 44)

(2) Prior to the issuance of the letter approving the plans, MPKj had issued a letter that the plans submitted had been approved but with the condition that the defendant complied with the conditions set down in the prior approved infrastructure and additional conditions. The letter of approval had clearly stated that the approval of the building plans was subject to the defendant complying with all the conditions. MPKj did not give any option to the defendant to decide and choose which condition they wished to comply with. (paras 33-35)

(3) The trial judge erred in failing to conduct critical evaluation of the conflicting evidence of both experts. Any acceptance or rejection of one version over the other must be based on a proper evaluation, detailed analysis and weighing of the entire body of evidence of both experts. Without evaluating the opinions of the experts, the trial judge went on to make a finding that there was no necessity for the defendant to construct the RC wall as required by condition 8. (para 42)

(4) By the letter of undertaking, issued after the approval and after MPKj confirmed that the height of the plaintiff and that of his neighbour's was 3750mm, the defendant undertook to be fully responsible in respect of the design and construction of the slope and to comply with all the conditions imposed by MPKj. Based on all the contemporaneous evidence, the court found that an RC wall must be built instead of a rubble wall in view of the undisputed height difference of more than 1200mm. The plaintiff was entitled to require the defendant to deliver the property under the SPA according to the approval of MPKj. (paras 45 & 46)

A ***Bahasa Malaysia*** *Headnotes*

Melalui perjanjian jual beli ('PJB'), plaintif membeli sebuah hartanah daripada pemaju ('defendan'). Walau bagaimanapun, selepas mengambil milikan hartanah tersebut, plaintif tidak boleh menetap secara fizikal di hartanah itu akibat kecacatan material dalam pembinaan hartanah tersebut.
B Plaintif menghujahkan bahawa defendan gagal dan/atau cuai membina dinding konkrit bertetulang ('dinding RC') seperti yang dinyatakan bawah syarat 8 Lampiran F ('syarat 8') pelan bangunan yang diluluskan/perintah pembangunan ('PP') oleh Majlis Perbandaran Kajang ('MPKj'). Plaintif menghujahkan bahawa defendan membina tiga dinding batu kasar dan bukan
C dinding RC untuk melindungi kestabilan hartanah bersebelahan. Kes plaintif yang diplid adalah defendan gagal dan/atau cuai mematuhi PP dan aku janji mereka sendiri untuk membina dinding RC atas cerun hartanah tersebut. Kegagalan defendan membina dinding RC mengakibatkan kerugian dan kesusahan kepada plaintif dan keluarganya dan mereka dinafikan kegunaan
D dan kenikmatan penuh hartanah itu, khususnya kawasan dapur basah. Sebaliknya, defendan menghujahkan, antara lain, bahawa (i) mereka telah mematuhi kesemua syarat yang terpakai yang dimasukkan dalam pelan bangunan yang diluluskan; (ii) keperluan dinding RC bawah syarat 8 hanya terpakai untuk garis tegak menjunam terus melebihi 1200mm; (iii) tiada garis
E tegak menjunam terus antara cerun di hartanah tersebut dan lot bersebelahan yang memerlukan dinding RC; dan (iv) kegunaan dinding tanah kasar mematuhi pelan bangunan yang diluluskan. Mahkamah Tinggi, dalam mempertimbangkan sama ada terdapat pelanggaran syarat 8 oleh defendan kerana gagal membina dinding RC, membuat dapatan berpihak pada
F defendan. Oleh itu, rayuan ini oleh plaintif. Plaintif menghujahkan, antara lain, syarat 8 perlu dipatuhi secara ketat oleh defendan dan tiada pengecualian kerana PJB dibuat menurut Akta Pemajuan Perumahan (Kawalan dan Pelesenan) 1966 dan Peraturan-peraturan Pemajuan Perumahan (Kawalan dan Pelesenan) 1989. Plaintif selanjutnya menghujahkan bahawa hakim bicara tidak memberi pertimbangan
G sewajarnya terhadap surat aku janji kepada MPKj yang menurutnya, defendan mengakujanji untuk bertanggungjawab sepenuhnya berkaitan dengan reka bentuk dan pembinaan cerun dan dinding RC dan mematuhi kesemua syarat yang dinyatakan oleh MPKj.

H **Diputuskan (membenarkan rayuan dengan kos)**
Oleh Hasnah Mohammed Hashim HMR menyampaikan penghakiman mahkamah:

(1) Syarat 8 tidak boleh dipertimbangkan secara terpencil daripada dokumen-dokumen lain yang relevan dengan pelan bangunan yang diluluskan dan surat menyurat berkaitan. Syarat 8 memerlukan dinding
I RC dibina apabila perbezaan aras platform melebihi 1200mm. Perbezaan aras platform di kawasan yang terjejas ialan 3.5 meter. Tidak dinyatakan atau dikhususkan bawah syarat 8 bahawa syarat itu hanya

terpakai pada platform bersebelahan seperti yang disarankan oleh pakar defendan dan arkitek defendan. Walaupun dengan menganggap bahawa syarat 8 adalah kabur dan terpakai pada platform bersebelahan, defendan tidak memohon penjelasan daripada MPKj tetapi sebaliknya memilih untuk mentafsir syarat 8 menurut pertimbangan mereka sendiri, yang berasaskan kos, dan tidak mengendahkan sama sekali syarat yang dikenakan oleh MPKj.

(2) Sebelum surat meluluskan pelan dikeluarkan, MPKj telah mengeluarkan satu surat bahawa pelan yang dikemukakan telah pun diluluskan tetapi dengan syarat defendan mematuhi syarat-syarat yang disenaraikan dalam infrastruktur yang diluluskan dan syarat-syarat tambahan terdahulu. Surat kelulusan jelas menyatakan kelulusan pelan bangunan tertakluk pada pematuhan kesemua syarat-syarat oleh defendan. MPKj tidak memberi apa-apa pilihan kepada defendan untuk memutuskan atau memilih syarat mana yang mereka ingin patuhi.

(3) Hakim bicara khilaf apabila gagal membuat penilaian kritikal keterangan bercanggah daripada kedua-dua pakar. Penerimaan atau penolakan mana-mana satu daripada versi tersebut berbanding yang satu lagi mesti berdasarkan pada penilaian sewajarnya, analisa terperinci dan imbangan keseluruhan keterangan kedua-dua pakar. Tanpa menilai pendapat pakar-pakar tersebut, hakim bicara terus membuat dapatan bahawa tiada keperluan untuk defendan membina dinding RC seperti yang diperlukan dalam syarat 8.

(4) Melalui surat aku janji, yang dikeluarkan selepas kelulusan dan selepas MPKj mengesahkan bahawa ketinggian antara hartanah plaintif dan jirannya ialah 3750mm, defendan mengakujanji untuk bertanggungjawab sepenuhnya berkaitan dengan rekabentuk dan pembinaan cerun dan mematuhi kesemua syarat yang dikenakan MPKj. Berdasarkan kesemua keterangan semasa, mahkamah mendapati dinding RC mesti dibina dan bukan dinding batu kasar memandangkan perbezaan ketinggian melebihi 1200mm. Plaintif berhak meminta defendan menyerahkan hartanah bawah PJB menurut kelulusan MPKj.

Case(s) referred to:

Dr Shanmuganathan v. Periasamy Sithambaram Pillai [1997] 2 CLJ 153 FC ***(refd)***

Jitweer Singh Ojagar Singh v. PP [2017] 2 CLJ 561 CA ***(refd)***

Mohamed Ismail Mohamed Shariff v. Zain Azahari Zainal Abidin & Ors [2013] 2 CLJ 717 FC ***(refd)***

Murarilal v. State of MP AIR 1980 SC 531 ***(refd)***

For the appellant - Sri Dev Nair, Ramesh Kanapathy & Shamalah Selvarajah; M/s Bodipalar Ponnudurai De Silva

For the respondent - Ng Siau Sun & Michele Kaur; M/s Sun & Michele

[Editor's note: Appeal from High Court, Shah Alam; Civil Suit No: BA-22C-6-02-2016 (overruled).]

Reported by S Barathi

A

JUDGMENT

Hasnah Mohammed Hashim JCA:

[1] The appeal before us was against the decision of the learned judge in the Shah Alam High Court dismissing the appellant's claim against the
B respondent and the respondent's counterclaim against the appellant. We had, after perusing the records of appeal and after considering the written and oral submissions of learned counsel for the appellant and the respondent, unanimously allowed the appeal with costs. The order of the High Court was set aside. We further ordered that the deposit be refunded. We now give our
C reasons for allowing the appeal.

[2] For the purpose of this judgment, the parties will be referred to as they were referred to in the High Court.

Background Facts

D **[3]** By a sale and purchase agreement dated 9 March 2012 ('the SPA') the plaintiff and his son, Kinagabran a/l Sivananthan purchased 2 1/2 storey Quad Villa held under H.S.(D) 156356 P.T.75801 Pekan Kajang with the address known as No.6, Jalan Jade Hills 10/2, Jade Hills, 43000 Kajang, Selangor ('the property'). The plaintiff purchased the property from the
E respondent, the developer of the housing development known as Jade Hills.

[4] The plaintiff took possession of the property on 29 June 2013 but could not physically occupy the property due to material defects in the construction of the property. The plaintiff sought the defendant's assistance to rectify the defects. Despite numerous letters and meetings between the
F parties, the defendant failed and/or refused to rectify the defects.

[5] The plaintiff contended that the defendant failed and/or neglected to build a "reinforced concrete wall" ('RC wall') as required under condition 8 annexure F ("condition 8") of the approved building plan/development order ("DO") dated 24 October 2010 (See: pp. 1-11 core bundle of document
G (CBD) vol. 1). It is contended by the plaintiff that instead of constructing the RC wall the defendant had constructed a three rubble wall to protect the stability of the adjoining property. It is the plaintiff's pleaded case that the defendant failed and/or neglected to comply with the DO and their own undertaking to construct the RC wall on the slope of the property. The failure
H of the defendant to construct the RC wall had caused damage and hardship to the plaintiff and his family. Water and sediment flow into the plaintiff's property every time it rains due to the rubble wall. The plaintiff and his family are deprived of the full use and enjoyment of the property, especially the wet kitchen area.

I **[6]** The plaintiff in the amended statement of claim stated that despite numerous inquiries, no confirmation was ever given by the defendant whether the RC wall will be constructed in accordance with the requirements of the DO. The defendant failed and/or neglected to comply with the DO

to construct the RC wall and failed and/or neglected to issue the certificate of completion and compliance (CCC) for the RK-D(i) type unit which was sold to the plaintiff as per the terms and conditions of the SPA. A

[7] The reliefs sought by the plaintiff, *inter alia*, are as follows:

(i) A declaration that the construction of the rubble wall without a supporting RC wall by the defendant has encroached upon the plaintiff's land and prevented the plaintiff from enjoying full usage of the land on the property; B

(ii) A declaration that the construction of the property and the rubble wall constructed by the defendant was not in accordance with the approved building plan and/or DO that was approved by the Majlis Perbandaran Kajang (MPKj); C

(iii) An order that the defendant removes the existing rubble wall and slope on the plaintiff's property and further constructs an RC wall on the property for the full height of the slope within three months of the order of the court; D

(iv) In the alternative, an order that the defendant constructs and builds the RC wall in accordance with the approved building plan and/or DO and/or any undertaking given by the defendant to the MPK; and E

(v) General damages to be assessed for the damage and inconvenience caused.

[8] The defendant denied that it did not comply with the approved building plan and/or DO and contended that it had complied with all the applicable conditions attached to the approved building plans. The requirement of an RC wall as required under condition 8 applies only to an immediate vertical drop exceeding 1200mm. Since there is no immediate vertical drop between the slope at the property and the neighbouring lot, the defendant is under no obligation to construct the RC wall. The use of the rubble wall was in accordance with the approved building plans. F G

[9] Following the plaintiff's complaint, the defendant, on a goodwill basis, took steps to redirect the water flow on the slope in January and February 2014 to prevent any seepage or flowing water or sediments from the slope into the wet kitchen and the yard. It is claimed that the rubble wall does not pose any danger or safety issue to the plaintiff as occupant of the property. H

[10] It is contended by the defendant that the plaintiff's complaint is baseless and a sham with the ulterior intention to compel the defendant to bear the costs and risk beyond the ambit of the agreed terms under the SPA. The claim by the plaintiff is an abuse of process and has caused the defendant loss and damages. The defendant filed a counterclaim against the plaintiff for general damages. I

A **Findings Of The High Court**

[11] The matter went on for full trial and the main issue tried before the High Court was essentially whether there was a breach of condition 8 by the defendant for failing to construct the RC wall. Having heard the evidence of the witnesses and having considered the documents that were tendered in
B court, the learned judge accepted the evidence of the defendant as being more probable than the evidence of the plaintiff.

[12] The findings of the learned judge in her grounds of judgment can be summarised as follows:

C (i) On condition 8: The interpretation of condition 8 by the defendant was accepted. To hold otherwise would lead to a situation where approved building plans would be negated. The defendant must comply with the approved building plans and any variation must be with the approval of MPKj, in this case, there was none.

D (ii) On the letter of undertaking: Accepted the evidence of DW4, that this was a standard letter required by MPKj for all projects during and after the application of CCC.

(iii) On s. 44 of the National Land Code and lateral support: Since condition 8 did not apply to the affected slope, the rubble wall remains. There is
E no issue of lateral support.

(iv) On the counterclaim: The defendant failed to prove the actual loss suffered.

Submission Of Parties

F

[13] In essence, the plaintiff's main argument is that the learned judge erred when she found that the plaintiff can only rely on the building plan approved by MPKj through the letter dated 24 December 2010 which was essentially an application for approval of a building plan. The said letter expressly stated that the approval of the building plan is subject to compliance with the
G conditions. Condition 8 specifically requires the construction of the RC wall where the platform level difference exceeds 1200mm. As long as the platform level difference exceeds 1200mm RC wall must be constructed. Learned counsel for the plaintiff submitted that condition 8 only mentioned "platform" and the learned judge was wrong to import words into condition
H 8 when there is no necessity to do so.

[14] Learned counsel for the plaintiff argued that it was not safe to rely on the defendant's report prepared by the defendant's expert, Ir Tu Yong Eng (DW5). DW5 prepared the report without conducting any visual or physical inspection of the property, in particular, the affected area. DW5 prepared his
I report relying totally on information given by his client, the defendant. The learned judge had not only relied on DW5's expert report but also the evidence of the defendant's architect, John Lau Kah Sieng (DW6) on the

interpretation and application of condition 8. DW6 had admitted in evidence that one of the reasons the defendant constructed the rubble wall instead of RC wall was essentially to save costs. The same witness also confirmed that the height of the platform is 3.5metres which is higher than 1200mm.

[15] On the other hand, the plaintiff's own expert witness, Spencer Klumai (PW2), had conducted a site inspection of the property and in particular the affected area. PW2 concluded that based on the building plans, the defendant had failed to comply with the requirement of condition 8 as the difference between the platform level of the plaintiff's lot and that of the neighbouring lot is 3500mm. Therefore, in compliance with condition 8, an RC wall should have been built by the defendant. By a letter dated 11 May 2015 MPKj confirmed that the height of the platform of the two lots is 3750mm. The construction of the rubble wall instead of an RC wall had caused damage to the plaintiff's property.

[16] It was argued by learned counsel for the plaintiff that there must be strict compliance by the defendant of condition 8 and that there can be no waiver of that condition as the SPA executed between the parties are as prescribed under the Housing Development (Control and Licensing) Act 1966 and Housing Development (Control and Licensing) Regulations 1989.

[17] Learned counsel for the plaintiff further argued that the learned judge had not given due weight to the letter of undertaking dated 3 May 2013 issued by the defendant to MPKj. By the letter of undertaking, the defendant undertook to be fully responsible in respect of the design and construction of the slope and RC wall and to comply with all the conditions laid down by MPKj.

[18] In opposing the appeal, learned counsel for the defendant argued that there was no breach of condition 8, the slope and the rubble wall were approved by MPKj and were in accordance with the terms of the SPA. Condition 8 cannot be read in isolation but must be read together with the approved plans. The former Pengarah of Jabatan Kawalan Bangunan MPKj (DW7) testified that condition 8 applied only to the structure of the property and not to the area outside the property.

Our Decision

[19] As stated at the outset of this judgment, we had after hearing submissions from counsel decided unanimously to allow this appeal with costs. The main issue in this appeal is the interpretation of condition 8 of the approval letter dated 24 December 2010 issued by MPKj and, whether the defendant breached condition 8. The learned judge found affirmatively for the defendant when she held that:

> 24. Although the interpretation requires the addition of the word "adjacent", the interpretation as offered by plaintiff similarly requires words to be added, namely "boundary" and "retaining" to qualify RC wall.

A

> 25. Further if 2 platforms are adjacent to each other the different level can readily be measured. Where platforms are apart there are many ways an engineer can design to cater for the difference as part of the architectural design and here it was addressed by a slope and rubble wall. As condition 8 refers to a wall to address the difference in levels the meaning of platform would mean 2 adjacent platforms.

B

[20] The defendant's interpretation of condition 8, accepted by the judge, is this, condition 8 only applies to an immediate vertical drop exceeding 1200 mm of which there was none in this case. The learned judge accepted the explanation of DW5 in his report that the immediate vertical drop and adjacent platform is the same. DW5 was of the opinion that condition 8 itself C is vague, therefore, the circumstances of the project must be examined. If the two platforms are immediately adjacent to each other the different level can be readily measured. In this project, however, in order to address the difference in levels of the neighbouring lots, the design was to use a slope and rubble wall. Condition 8 refers to the construction of a RC wall to address D the difference in levels, thus DW5 concluded the platform must refer to the two platforms immediately adjacent to each other.

[21] Learned counsel further argued that if there was such a requirement to build an RC wall by MPKj then, MPKj would have expressly indicated on the building plans submitted by the defendant and would not have E approved the said building plans. Condition 8 is not a comment neither is it a requirement to amend and/or change the building plans.

[22] In arriving at our decision, we have examined and considered all the relevant documents. We agreed with the submission of learned counsel for F the defendant that condition 8 cannot be considered in isolation of the documents relevant to the approved buildings plans and related correspondences.

[23] The letter of approval of the building plans submitted by the defendant through its architect, Arkitek KDI Sdn Bhd, had stated that the approval was G subject to the stipulated conditions. One of the conditions is to comply with the conditions of Jabatan Teknikal as attached in lampiran/annexures A, C, E, F, G and H. Condition 8 lampiran/annexures stipulated as follows:

> 8. Hendaklah mengadakan tapak dinding konkrik bertetulang bagi perbezaan aras platform yang melebihi 1200mm.

H

Condition 8 simply requires an RC wall to be constructed where there is a platform level difference exceeding 1200mm. The defendant's own witness, DW6 confirmed that the platform level difference at the affected area is 3.5 meters. The learned judge relied on the evidence of DW5 and accepted the suggestion by DW5 that the intent and application of condition 8 applies I only to an immediate vertical drop exceeding 1200mm. In his report, DW5 was of the opinion that the language of condition 8 is vague:

4.2 The language of Condition 8 is vague. If read on its own, it leads to confusion. In interpreting its meaning, we need to look at circumstances of the project."

(See: pg 170 CBD Vol 1).

[24] DW5 concluded in para. 4.6 of his report (See: p. 171 CBD vol 1) as follows:

The requirement of reinforced concrete wall in Condition 8 of Lampiran F is only applicable to the area where retaining wall is needed, and the exposed wall height (i.e the height of the common vertical surface) is above 1200mm.

[25] DW5 also said that there have been many failures involving rubble walls especially earth retaining walls. Therefore, MPKj made it mandatory that reinforced concrete wall be built if the wall is higher than 1200mm:

5.0 Based on my dealings with MPKj, I understand that there have been many failures involving rubble walls especially earth retaining wall. Hence, reinforced concrete wall was made mandatory by MPkj if the wall is higher than 1200mm ... (See: pg 171 CBD Vol 1).

[26] In respect of the affected area of the plaintiff's property, this is what DW5 said in his report:

7.1 I am informed that there is a rubble wall at the lower end of the slope within the compound.

7.2 I am also informed by Jade Homes Sdn Bhd that the exposed height of the rubble wall is approximately 900 mm.

7.3 As its exposed height is less than 1200, Condition 8 of Lampiran F does not apply.

[27] DW5 prepared his expert report relying purely on the building plan approval dated 24 October 2010, approved drawings and information given by the defendant. DW5 did not conduct any physical inspection of the affected area of the property.

[28] The plaintiff's expert, Ir Spencer Klumai (PW2), a civil engineer prepared his report dated 21 November 2016 based on the relevant plans, documents and after inspecting the property. In his report, PW2 stated that based on the drawings and the plans, the difference in platform level between the plaintiff's property and that of his immediate neighbour is 3500mm. In PW2's opinion, there is a necessity for an RC wall to be built:

Oleh kerana jelas menurut lukisan dan pelan-pelan di atas bahawa perbezaan aras platform untuk rumah En Sivananthan dan rumah jiran di bahagian belakang adalah 3.5m (yang mana telah melebihi had 1200mm saperti disyaratkan), maka ada keperluan untuk memenuhi syarat membina RC Retaining Wall di sempadan belakang rumah En Sivananthan dan jiran di belakangnya.

[29] PW2 conducted a physical site inspection of the affected area and concluded in his report:

> Saya berpendapat bahawa syarat no.8 didalam Lampiran F tidak dipenuhi kerana jika perbezaan aras platform yang dinyatakan didalam syarat tersebut kepada kedudukan ketinggian aras tingkat bawah rumah jiran dan aras tingkat bawah rumah En Sivananthan, kerana jelas disini perbezaan aras platform tersebut adalah 3500mm. Maka, dengan itu, tembok penahanan dari jenis Konkrit Bertetulang (RC Retaining Wall) perlu digunakan bagi memenuhi syarat 8 didalam Lampiran F.

[30] PW2 also prepared a report in response to DW5's expert report. The report dated 1 March 2017 was appended together with his witness statement. In response to DW5's opinion that condition 8 is vague, PW2 explained:

> Syarat 8 Lampiran F adalah jelas dan tiada apa-apa meragukan. Ianya sudah jelas menyatakan "Hendaklah mengadakan tapak dinding kontrik bertetulang bagi perbezaan aras platform yang melebihi 1200mm.Perbezaan aras platform yang dirujuk disini bermaksud ketinggian diantara dua platform muktamad yang disediakn oleh pemaju.
>
> Dalam kes ini ianya merujuk kepada perbezaan aras platform lot rumah Plaintif dan aras platform lot rumah jiran di belakang. Perbezaan aras platform didalam kes ini tidak boleh dirujuk sebagai perbezaan aras bermula diatas tembok rubble wall yang dibinakan kawasan rumah Plaintif dan dibandingkan pula satu lagi aras platform dalam kawasan rumah Plaintif.

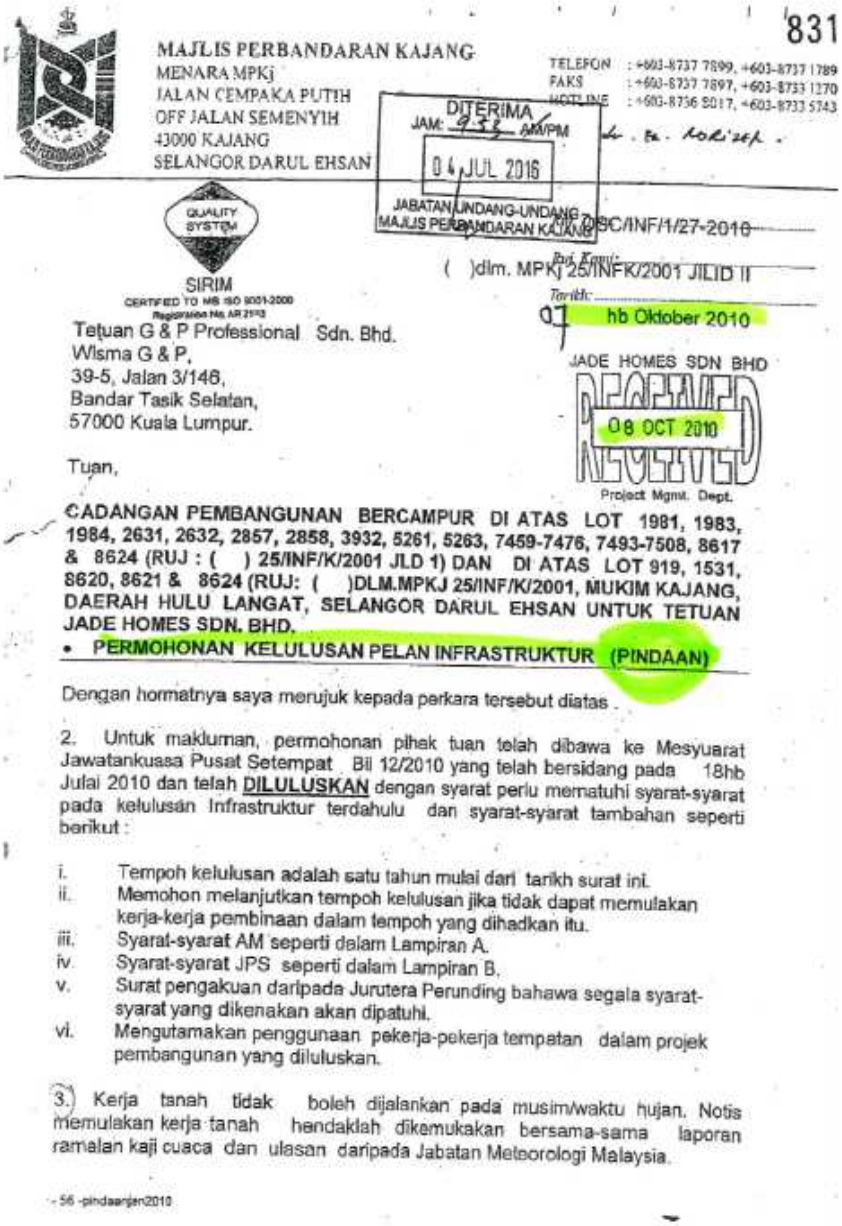
[31] PW2 opined that since the difference in the platform level between the neighbouring lot behind the property is 3500mm then an RC wall must be constructed:

> Perlu ditekankan disini bahawa, keadaan "siap telah dibina' dengan nyata menunjukkan perbezaan aras platform antara lot rumah jiran dibelakang dan rumah Plaintif adalah lebih kurang 3500mm iaitu melebihi 1200mm. Oleh yang demikian, tembok penahan daripad jenis "reinforced Concrete Retaining Wall" perlu dibina di sepanjang sempadan belakang dan bukannya sebahagian sahaja.

[32] The learned judge however, preferred the opinion of DW5 and the suggestion that condition 8 applies only to an immediate vertical drop exceeding 1200 mm. She agreed with DW5's view that the conditions in lampiran A – H are general requirements and applicable only if relevant. The purpose of the conditions serves as only a reminder to resolve any ambiguity in the approved plans and not meant to contradict the approved plans (See: para. 18 of the grounds of judgment).

[33] Prior to the issuance of the letter approving the plans *vide* letter dated 24 December 2010, MPKj had issued a letter dated 7 October 2010 that the plans submitted have been approved but with the condition that the defendant was to comply with the conditions as set down in the prior

approved infrastructure and additional conditions - " ... Diluluskan dengan syarat perlu mematuhi syarat-syarat pada kelulusan infrastruktur terdahulu dan syarat- syarat tambahan..":



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MAJLIS PERBANDARAN KAJANG
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39-5, Jalan 3/146,
Bandar Tasik Selatan,
57000 Kuala Lumpur.

JADE HOMES SDN BHD
RECEIVED
08 OCT 2010
Project Mgmt. Dept.

Tuan,

CADANGAN PEMBANGUNAN BERCAMPUR DI ATAS LOT 1981, 1983, 1984, 2631, 2632, 2857, 2858, 3932, 5261, 5263, 7459-7476, 7493-7508, 8617 & 8624 (RUJ : ( ) 25/INF/K/2001 JLD 1) DAN DI ATAS LOT 919, 1531, 8620, 8621 & 8624 (RUJ: ( )DLM.MPKJ 25/INF/K/2001, MUKIM KAJANG, DAERAH HULU LANGAT, SELANGOR DARUL EHSAN UNTUK TETUAN JADE HOMES SDN. BHD.

- **PERMOHONAN KELULUSAN PELAN INFRASTRUKTUR (PINDAAN)**

Dengan hormatnya saya merujuk kepada perkara tersebut diatas.

2. Untuk makluman, permohonan pihak tuan telah dibawa ke Mesyuarat Jawatankuasa Pusat Setempat Bil 12/2010 yang telah bersidang pada 18hb Julai 2010 dan telah **DILULUSKAN** dengan syarat perlu mematuhi syarat-syarat pada kelulusan Infrastruktur terdahulu dan syarat-syarat tambahan seperti berikut :

i. Tempoh kelulusan adalah satu tahun mulai dari tarikh surat ini.
ii. Memohon melanjutkan tempoh kelulusan jika tidak dapat memulakan kerja-kerja pembinaan dalam tempoh yang dihadkan itu.
iii. Syarat-syarat AM seperti dalam Lampiran A.
iv. Syarat-syarat JPS seperti dalam Lampiran B.
v. Surat pengakuan daripada Jurutera Perunding bahawa segala syarat-syarat yang dikenakan akan dipatuhi.
vi. Mengutamakan penggunaan pekerja-pekerja tempatan dalam projek pembangunan yang diluluskan.

3. Kerja tanah tidak boleh dijalankan pada musim/waktu hujan. Notis memulakan kerja tanah hendaklah dikemukakan bersama-sama laporan ramalan kaji cuaca dan ulasan daripada Jabatan Meteorologi Malaysia.

- 56 -pindaanjan2010

[34] This was followed by MPKj's letter dated 24 December 2010 informing the defendant that the building plans were approved subject to conditions, *inter alia*, complying with the conditions imposed by the technical department as indicated in appendix A-H:

MAJLIS PERBANDARAN KAJANG

C.C.C.

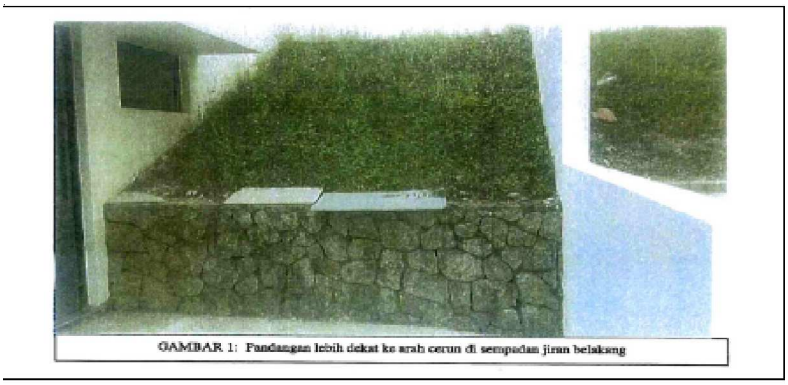
24 DEC 2010

[35] The letter of approval had clearly stated that the approval of the building plans is subject to the defendant complying with all the conditions as set out in appendix A-H. MPKj did not give any option to the defendant to decide and choose which condition they wish to comply with. The approval is subject to the defendant complying with all the conditions imposed by MPKj.

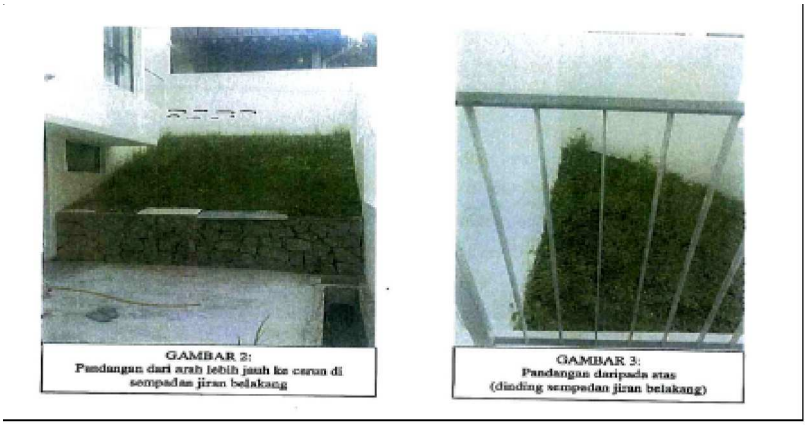
[36] Lampiran/annexure F reads as follows:

LAMPIRAN F

[37] In his report, PW2 who visited the property took photos to explain why an RC wall should have been built (See: pp. 153 and 154 CBD vol 1):

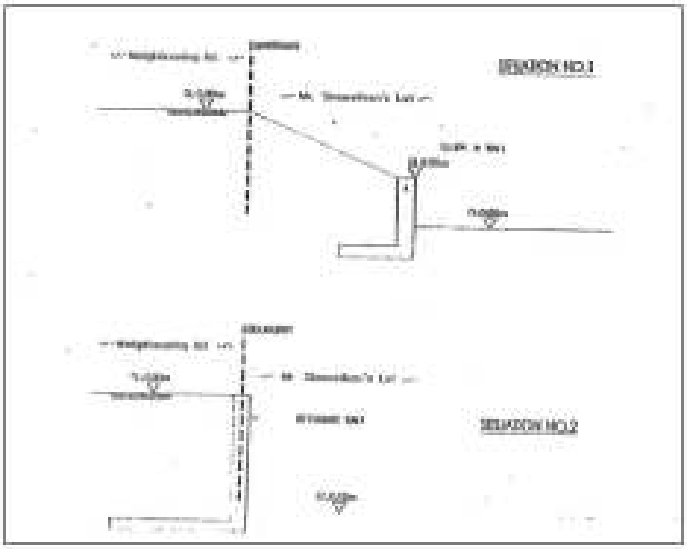


GAMBAR 1: Pandangan lebih dekat ke arah cerun di sempadan jiran belakang


GAMBAR 2:
Pandangan dari arah lebih jauh ke caruh di sempadan jiran belakang
GAMBAR 3:
Pandangan daripada atas
(dinding sempadan jiran belakang)

[38] PW2 concluded that since the difference in height of the platform is 3500mm, an RC wall should have been built by the defendant in compliance with condition 8. He further explained in his report in reply to DW5's report that the difference in the level of the platform means the difference in height between the two platforms built by the defendant:

> Didalam kes ini ianya merujuk kepada perbezaan aras platform lot rumah plaintiff dan aras platform lot rumah jiran belakang. Perbezaan aras platform dalam kes ini tidak boleh dirujuk sebagai aras bermula diatas tembok rubble wall yang dibinakan kawasan plaintiff dan dibandingkan satu lagi aras platform dalam kawasan rumah plaintiff." (See: pg 190 CBD Vol 1)



[39] PW2 in his report prepared a diagram comparing two situations of the plaintiff's affected area. Situation 1 shows the area without RC wall and situation 2 if an RC wall is constructed. He meticulously explained in the report and during cross-examination as well as re-examination that if an RC wall is not constructed the structural integrity of the plaintiff's land is dependent on the neighbour's land and if the plaintiff construct or renovate the said area bordering his neighbour, it will affect the structural integrity and stability of his neighbour's land as well as that of the plaintiff's:

> ... Situasi no. 1 menunjukkan bahawa kestabilan struktur tanah di sempadan lot rumah jiran bergantung dan boleh di pengaruhi oleh kestabilan struktur tanah didalam lot rumah Plaintif jika diganggu.Oleh itu, Plaintif tidak ada kebebasan untuk mengubahsuai struktur tanah bagi mendapatkan ruang yang lebih baik bagi kegunaan beliau, memandangkan jika tembok penahanan diganggu atau dipindah kedudukannya, ianya boleh memberi kesan pada kestabilan tanah jiran. Walau bagaimanapun, keadaan ini tidak akan berlaku jika keadaan disempadan adalah saperti di Situasi No. 2. Di dalam keadaan ini, tembok penahan berada betul-betul di atas sempadan dan Plaintif tidak perlu membuat apa-apa ubahsuai bagi mendapatkan lebih ruang untuk digunakan.
>
> ... Perlu ditekankan disini bahawa, keadaan "siap telah dibina" dengan nyata menunujukkan perbezaan aras platform antara lot rumah jiran di belakang dan rumah plaintiff adalah lebih kurang 3500mm lebih melebihi 1200mm.Oleh yang demikian, tembok penahanan daripada jenis "reinforced Concrete Retaining Wall" perlu dibina di sepanjang sempadan belakang dan bukannya sebahagian sahaja."(See:pg 191 CBD Vol 1).

[40] When confronted by a divergence of expert opinion based upon the same fact (as in this case) it is incumbent upon the judge to weigh and assess carefully the evidence and accept if necessary the most reliable parts in forming its decision (See: *Mohamed Ismail Mohamed Shariff v. Zain Azahari Zainal Abidin & Ors* [2013] 2 CLJ 717). In her grounds of judgment, the learned judge referred to the evidence of PW2, however, failed to give any reason why she preferred the evidence of the defendant's expert, DW5.

[41] Anuar CJ Malaya (as he then was) in *Dr Shanmuganathan v. Periasamy Sithambaram Pillai* [1997] 2 CLJ 153 referred to the Supreme Court of India's decision in *Murarilal v. State of MP* AIR 1980 SC 531 at p. 534:

> But, the hazard in accepting the opinion of any expert, handwriting expert or any other kind of expert, is not because experts, in general, are unreliable witnesses - the equality of credibility or incredibility being one which an expert shares with all other witnesses - but because all human judgment is fallible and an expert may go wrong because of some defect of observation, some error of premises or honest mistake of conclusion. The more developed and the more perfect a science, the less the chance of an incorrect opinion and the converse if the science is less developed and imperfect ...

[42] Whilst the grounds of judgment contained a summary of the evidence of PW2 and DW5, we are constrained to find that the learned judge erred in failing to conduct critical evaluation of the conflicting evidence, of which there are many, of both the experts. The learned judge accepted wholly the evidence of DW5 for reasons only known to Her Ladyship. However, any acceptance or rejection of one version over the other must be based on a proper evaluation, detailed analysis and weighing of the entire body of evidence of both the experts. Without evaluating the opinions of the experts, the learned judge went on to make a finding that there is no necessity for the defendant to construct the RC wall as required by condition 8. We therefore agreed with learned counsel for the plaintiff that had the learned judge evaluated the competing views, Her Ladyship would have found there to be reason to discount the opinion of DW5.

[43] This court in *Jitweer Singh Ojagar Singh v. PP* [2017] 2 CLJ 561 observed:

> It is trite law that a judge must not consider expert evidence in a vacuum in the sense that the same should not be artificially separated from the rest of the evidence. When there is conflicting opinion, a judge should test it against the background of all the other evidence available in that particular case in order to decide which expert evidence is to be preferred. In particular, a judge must have regard to the direct evidence, whether in the form of oral evidence or contemporaneous documents, and the overall circumstances material to the issue at hand. The version more consistent with these ought to be accepted as being more trustworthy and reliable.

[44] Thus, in our judgment, the learned judge erred when she said that the interpretation of condition 8 "… requires the addition of the word "adjacent"- Her Ladyship concluded that condition 8 refers to a wall to address the difference in levels and that the meaning of platform would mean two adjacent platforms. We are in agreement with the view expressed by PW2 that the words used in condition 8 are simple and straightforward, that is, if the level between the two platforms is higher than 1200mm, an RC wall must be built. It is neither stated nor specified under condition 8 that it only applies to adjacent platforms as suggested by DW5 and DW6. DW7 who was the superintending officer for the project confirmed in his oral evidence that the level difference between the property and the back of the neighbour's property exceeded 1200mm. This is not only to ensure structural integrity between the two properties but the safety of the occupiers as well. Even assuming condition 8 is vague and applies to adjacent platform as suggested by DW5, the defendant did not seek any clarification from MPKj but instead chose to interpret condition 8 according to their own considerations and ignored completely the conditions imposed by MPKj. And, the evidence showed that the defendant's consideration was essentially costs driven.

[45] Condition 8 and the plans dated 24 December 2010 and 7 October 2010 as well as the letter of undertaking together with the CCC must be read together. By the letter of undertaking dated 3 May 2013, issued after the approval and after MPKj confirmed that the height of the plaintiff and that of his neighbour's is 3750mm, the defendant undertook to be fully responsible in respect of the design and construction of the slope and to comply with all conditions imposed by MPKj:

Jade Homes Sdn Bhd 710233-k

Rujukan: MPKj 25/INF/IK/2001 Jld II
Rujukan kami : JH/PMD/Phs7B2/1.01/MPKJ/13/038

Property Gallery,
Persiaran Jade Hills Utama,
Jade Hills,
43000 Kajang,
Selangor Darul Ehsan.
Tel : 03 – 8713 8619
Fax: 03 – 8723 6508 (PMD)
03 – 8723 8836 (CMD)

SURAT AKU JANJI

NAMA PEMILIK : JADE HOMES SDN BHD

ALAMAT SURAT MENYURAT : PROPERTY GALLERY,
PERSIARAN JADE HILLS UTAMA,
JADE HILLS, 43000 KAJANG,
SELANGOR DARUL EHSAN

YANG DIPERTUA
Majlis Perbandaran Kajang
Menara Kajang
Jalan Campaka Putih,
Off Jalan Semenyih,
43000 Kajang
Selangor Darul Ehsan

Y. Bhg. Dato'/Tuan/Puan,

CADANGAN PEMBANGUNAN PERUMAHAN 112 UNIT FASA 7B YANG TERDIRI DARIPADA:

i.19 UNIT RUMAH TERES 2 TINGKAT JENIS RT 2-A
ii.6 UNIT RUMAH TERES 2 TINGKAT JENIS RT 2-A1
iii.11 UNIT RUMAH TERES 2 TINGKAT JENIS RT 1-B
iv.4 UNIT RUMAH TERES 2 ½ TINGKAT JENIS RT 1-B1
v.36 UNIT RUMAH KLUSTER 2 TINGKAT JENIS RK-C
vi.36 UNIT RUMAH KLUSTER 2 ½ TINGKAT JENIS RK-D
vii. 1 UNIT PENCAWANG ELEKTRIK (PE)

DI ATAS SEBAHAGIAN LOT 7474, 7475, 7476, 7489, 7490, 7508, DAN 8525, MUKIM KAJANG, DAERAH HULU LANGAT, SELANGOR DARUL EHSAN UNTUK TETUAN JADE HOMES SDN. BHD.
(MELIBATKAN 51 UNIT: 11 UNIT RUMAH TERES 2 TINGKAT JENIS RT 1-B, 4 UNIT RUMAH TERES 2 TINGKAT JENIS RT 1-B1, 18 UNIT RUMAH KLUSTER 2 TINGKAT JENIS RK-C, 18 UNIT RUMAH KLUSTER 2 ½ TINGKAT JENIS RK-D DAN KERJA-KERJA INFRASTRUKTUR)
(Jade Hills Fasa 7B2)

Bahawa saya/kami JADE HOMES SDN. BHD. No. Pendaftaran Syarikat: 710233-K dan beralamat di Property Gallery, Persiaran Jade Hills Utama, Jade Hills, 43000 Kajang, Selangor Darul Ehsan adalah pemilik - Lot 7474, 7475, 7476, 7489, 7490, 7508, dan 8525 untuk CADANGAN PEMBANGUNAN PERUMAHAN MELIBATKAN 19 UNIT RUMAH TERES 2 TINGKAT JENIS RT 2-A, 6 UNIT RUMAH TERES 2 TINGKAT JENIS RT 2-A1, 11 UNIT RUMAH TINGKAT JENIS RT 1-B, 4 UNIT RUMAH TERES 2 ½ TINGKAT JENIS RT 1-B1, 36 UNIT RUMAH KLUSTER 2 TINGKAT JENIS RK-C, 36 UNIT RUMAH KLUSTER 2 ½ TINGKAT TINGKAT JENIS RK-D, DAN 1 UNIT PENCAWANG ELEKTRIK (JADE HILLS FASA 7B2)

[46] Based on all the contemporaneous evidence, both oral and documentary, we are of the considered view that an RC wall must be built instead of a rubble wall in view of the undisputed height difference of more than 1200mm. The plaintiff is entitled to require the defendant to deliver the property under the SPA, according to the approval of MPKj.

Conclusion

[47] In conclusion, after having heard the parties at length and upon careful perusal of the records of appeals, we are of the considered opinion that this is a case in which appellate intervention was warranted.

[48] For the foregoing reasons, we unanimously allowed the appeal in particular prayers 25 (iii) and (v) of the statement of claim with costs. We set aside the High Court judgment. General damages to be assessed by the High Court Judge. As for costs, we awarded a sum of RM100,000 here and below to the appellant to be paid by the respondent subject to payment of allocatur. We also ordered that the deposit be refunded to the appellant.